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IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1968

NO. 613

Thomas W. McArthur et. al.,.

Petitioners,

vs.

Clark Clifford, Secretary of Defense, and
Stanley Resor, Secretary of the Army et. al,

Respondents.

REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION TO THE PETITION FOR CERTIORARI

Philip J. Hirschkop
110 North Royal Street
P.O. Box 234
Alexandria, Virginia 22313
703-836-5550

Lawrence R. Velvel
University of Kansas Law School
Lawrence, Kansas 66044
913-864-4194

Attorneys for Petitioners

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In their memorandum in opposition to the petition for certiorari, the respondents make the following statements:

> The reserve unit to which petitioners belong was called to active duty pursuant to Section 101(e) of P.L. 89-687, which provides:
>
> > Notwithstanding any other provision of law, until June 30, 1968, the President may, when he deems it necessary, order to active duty any unit of the Ready Reserve of an armed force for a period not to exceed twenty-four months.
>
> This statute does not unconstitutionally delegate legislative power to the President, nor lack adequate standards. The authority given to the President to order reserve units to active duty "when he deems it necessary" involves the exercise of his broad authority as Commander-in-Chief to determine whether the national security requires an increase in the size of the armed forces. Cf. Bowles v. Willingham, 321 U.S. 503; Yakus v. United States, 321 U.S. 414. Moreover, since the President is acting in that capacity rather than exercising legislative authority delegated by Congress, the statute presents no problem under the separation-of-powers doctrine.

Petitioners wish to explicitly call this Court's attention to the full import of what respondents are saying in the above quotation. Respondents are claiming that, at least insofar as

calling Reservists to active duty is concerned, the power to determine what sized armed forces are necessary to the national security is not a legislative power, but a power which resides in the Commander-in-Chief. Respondents are claiming that, as Commander-in-Chief, the President can call Reservists to active duty whenever he thinks our security requires it, and his action would involve no separation of powers problem because he would not be exercising a legislative power.

The implications of Respondents' claim are enormous, to say the least. Since Respondents say that, in regard to calling up Reservists, the power to decide what sized army we shall have is not a legislative power but a Presidential power, it is clear that under their claim the President could call Reservists to active duty even if there were no statute providing for this. Moreover, the President could do so in his sole discretion and without any guidelines. In regard to calling Reservists to active duty, then, Respondents' claim comes down to this: whenever the President thinks he needs a bigger army, he can have a bigger army. Such a claim goes a long way towards destroying the constitutional balance which explicitly gives Congress the power to raise armies, to provide for navies, and to raise taxes for the common defense. And it is but a relatively short step from (1) claiming that, even in the absence of statutory authority, the President as Commander-in-Chief can call Reservists to active duty whenever he thinks our security requires a bigger army, to (2) claiming that, even in the absence of statutory authority, the President as Commander-in-Chief can draft men whenever he thinks our security requires a bigger army.*

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*Lest one think that it is unthinkable that any President would ever make the latter claim, petitioners note that President Truman made a very analogous claim in Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952). In that case the government claimed that, even in the absence of statutory authority, the President as Commander-in-Chief could seize private industry when he thought it necessary for the nation's security.

The extremely broad nature of Respondents' claim serves to reemphasize a point which Petitioners made in their Petition For Certiorari. While this case involves several very important legal issues, the deepest and most fundamental question here is whether, in the particular areas of military and foreign affairs involved, the Presidency is now so powerful that it is subject to no law but its own desires, i.e. whether the Presidency is above the law. Petitioners respectfully suggest to this Court that this deep and fundamental question, as well as several of the legal questions presented in this case, are critical to the future of the country and should be decided by this Court.

Respectfully submitted,

Philip J. Hirschkop
Philip J. Hirschkop
110 North Royal Street
P.O. Box 234
Alexandria, Virginia 22313
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Lawrence R. Velvel
University of Kansas Law School
Lawrence, Kansas 66044
913-864-4194

Attorneys for Petitioners

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